IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6848 OF 2006

Shri Pandurang Ganpati Bansode ..Petitioner

Vs.

Shri Sahadeo Ramchandra Bhanhage & Ors. ..Respondents

Mr.Dilip Bodake for the petitioner

Ms.Bhalekar i/b U.P.Warunjikar for respondent no.2

CORAM : A.P.DESHPANDE, J

DATED : 16TH NOVEMBER, 2006

P.C.:

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of the parties.

2. The present petitioner is the original plaintiff who claims to have taken possession of the suit land under an agreement for sale dt. 18.10.05. The said agreement though purports to have been executed by five persons who are shown to be major so also there are three parties who are

shown to be the consenting parties, the agreement is really signed only by vendor no.1 for and on behalf of 2 to 5 and he himself appears to have signed even for the consenting parties. The suit property appears to be joint family property. As the petitioner apprehended that the respondents are trying to sell the said property and / or create third party interest therein, he instituted a regular civil suit for perpetual injunction simpliciter, making a prayer that the respondents be restrained from alienating the suit property and / or from creating third party interest therein so also prayed that the respondents be restrained from disturbing his possession over the suit land. The petitioner also filed an application claiming temporary injunction seeking to restrain the respondents from either alienating the property and / or from disturbing the possession of the petitioner. The respondents herein who are original defendants resisted the application by raising various pleas including those narrated herein below.

a) That the document viz agreement of sale executed

by the defendant no.1 is not a registered document and hence, the same is in admissible in evidence. Reliance is placed on the phraseology used in s.34 of the Bombay Stamp Act.

b) It is then contended that the plaintiff has not filed a suit for specific performance and has chosen to file a suit for perpetual injunction only and if this be so then the obvious intention of the plaintiff while relying upon the agreement of sale is to establish parting of possession by the defendants in favour of the petitioner. In the submission of the learned counsel for the respondents / defendants to establish possession, the plaintiff cannot take assistance of the said unregistered document in as much as the document is being used for a dominant purpose to establish possession and the purpose is not collateral.

c) That the agreement of sale whereunder possession is claimed to have been parted by the respondents in favour of the petitioner needs to be impounded etc.

3. The trial court did record the finding that the petitioner is in possession of the property but that finding has been recorded mainly by placing reliance on the agreement of sale which document is in admissible in evidence by virtue of s.34 of the Bombay Stamp Act. It is also relevant to note that as the suit is not for specific performance of the contract and is one for perpetual injunction simpliciter, the factum of possession would be a dominant purpose and not a collateral purpose.

4. Be it as it may, it is very strange that the first appellate court has not addressed itself to the question of possession which is relevant for adjudicating the issue of temporary injunction.

5. It is yet again very strange that in the appellate order at more than one places it is observed that the relief claimed by the defendants is one of mandatory injunction when the same is obviously for prohibitive injunction, seeking to restrain the defendants from doing something.

6. By so concluding, that the suit is for

mandatory injunction and the temporary injunction claimed is also yet again for mandatory injunction, the first appellate court has allowed the appeal and set aside the order passed by the trial court.

7. To say the least, the impugned order passed by the Adhoc District Judge -3, Satara dt.4.10.06 is wholly unsustainable as the same proceeds on an incorrect premise touching the nature of the prayer made for temporary injunction, besides the fact that the impugned order does not deal with the relevant issues such as possession and admissibility of the agreement of sale and the question as to whether the recital made therein of handing over possession could be looked into for the purpose for which the injunction application is moved. The order being patently illegal has to be set aside and I proceed to set aside the same.

8. In the result, I am remanding the matter to the first appellate court for de novo hearing of the appeal. At this stage, the learned counsel for the respondents state that the defendants/respondents will not alienate the suit

property nor will they create any third party rights in the suit property till the decision of the Misc. Civil Appeal. I do not propose to pass any order touching the prayer for temporary injunction in view of the fact that this court while issuing notice had directed the parties to maintain status quo vide order dt.16.10.2006.

9. In my opinion, the continuounce of the said order of statusquo, till the decision of the Misc.Civil Application, would subserve the ends of justice. In the result, the impugned order passed by the Adhoc District Judge-3, Satara dt.4.10.06 is quashed and set aside. Matter is remanded to the first appellate court for de novo hearing and decision of the Misc.Civil Appeal bearing no.102 of 2006. I direct the first appellate court to decide the Misc.Civil Appeal within three months from today. Rule made absolute.

(SHRI A.P.DESHPANDE, J)